United States
Circuit Court of Appeals
For the Ninth Circuit

MERCHANTS & INSURERS' REPORTING COMPANY, a Corporation, and BANKERS' FIRE INSURANCE COMPANY, a Corporation,

Appellants,

vs.

F. A. JONES, Intervener, and LYSANDER CASSIDY, as Receiver of the BANKERS' FIRE INSURANCE COMPANY, a Corporation,

Appellees.

No. 2477

MERCHANTS & INSURERS' REPORTING COMPANY, a Corporation, and PHOENIX FIRE UNDERWRITERS, a Corporation,

Appellants,

vs.

F. A. JONES, Intervener, and LYSANDER CASSIDY, as Receiver of the PHOENIX FIRE UNDERWRITERS, a Corporation,

Appellees.

No. 2476

Appellant's Brief

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APPELLANTS' BRIEF.

Appellants respectfully move to consolidate Cause No. 2476 and Cause No. 2477 and to be permitted to submit the following brief in support of the appeals

taken in each case. By stipulation of counsel the decision in one case shall be binding in the other. The facts with reference to each defendant are practically identical (R. 2476, p. 25).

The complainant and defendants, Phoenix Fire Underwriters and Bankers' Fire Insurance Company, appeal jointly from orders of the District Court of the District of Arizona, dated July 1, 1914, appointing a receiver of the Phoenix Fire Underwriters and the Bankers' Fire Insurance Company.

FACTS.

The Merchants & Insurers' Reporting Company, a California corporation, instituted two actions on the Equity side of the Court below, one to dissolve the Phoenix Fire Underwriters, an Arizona corporation, and the other to dissolve the Bankers' Fire Insurance Company, another Arizona corporation. Federal jurisdiction in each case depended upon diversity of citizenship and involved the requisite amount. No question exists with reference thereto.

It appeared that the plaintiff company owned all of the stock of both defendant companies; that the defendant had practically no debts and that they had reinsured all of the outstanding insurance amounting to about one million dollars, and that the defendant com-

panies were the legal owners of assets, most of which consisted of mortgages and negotiable investments enforcible against residents of California, the collection of which was embarrassed by the legal ownership thereof by the defendants when in reality the complainant was the beneficial owner of the assets, and inasmuch as the defendant companies had no excuse for continued existence and the nature of their assets made their continued existence and operation as insurance companies a public menace, the complainant desired to have them dissolved and their assets legally transferred to the complainant.

The defendant companies endeavored in every way to facilitate their own dissolution and acted in perfect accord and harmony with the complainant company. Consequently, when the complainant filed the bills for dissolution of both companies on October 25, 1913, the defendants voluntarily appeared and answered, admitting all the allegations of the bill and joined in the complainant's prayer for relief.

The cause was tried Nov. 12, 1913, and all the allegations of the bill were duly proved (R. 2476, p. 1-20). The complainant prayed that for the purpose of dissolution the directors of the defendants might be constituted trustees (R. 2477, p. 9) under such bond as the court might impose and supplemented this request with resolutions of its directors expressing the fullest confidence in the officers of the defendants (R. 2476, p. 7).

The directors of the defendants offered to serve as such trustees under any bond the court might fix and without compensation.

We fail to find the court's oral comment in the record, but we are confident it will not be denied that at this juncture the court expressed the view *sua sponte* that a receiver ought to be appointed.

It does appear that after the reception of the evidence the court took the matter under advisement until a future day (R. 2476, p. 1), R. 2477, p. 13).

There was no issue of fact or of law between the complainant and the defendant. There was nothing to take under advisement except the request of both parties that the directors of the defendant be permitted to serve as trustees for purposes of dissolution.

On December 13, 1913, an order was made setting for hearing the application of F. A. Jones for leave to intervene (R. 2477, p. 15), and on December 20, 1913, Jones was permitted to file an amended petition for leave to intervene (R. 2477, p. 15).

The amended petition of Jones filed on Dec. 20, 1913, alleged in substance (R. 2477, p. 16-27) that Jones was a stockholder to the extent of 50 shares in the complainant company; that he represented by written authority eight other stockholders who owned 555 shares in the complainant; that since February, 1913, the defendant company had not been engaged in the conduct of any

business "except the collection of certain outstanding notes;" that large amounts of money had been expended by the officers of the defendant in salaries of the officers, and traveling and expenses and the officers of the defendant have been withdrawing from the treasury of the company for alleged services and have paid out large sums as attorney's fees, which expenditures occasioned great loss to the stockholders of the defendants. It was charged that at a stockholders' meeting of the complainant a majority of over two-thirds of the issued stock of the complainant had agreed, and the officers of the complainant had pledged themselves to effect a dissolution of the defendants immediately, but that since such time the officers of the defendants have wasted the company's assets and grossly mismanaged the affairs of the company "to a large extent" and have failed to take steps toward a dissolution before the institution of the present action, and that about Sept. 15, 1913, various stockholders of the complainant filed a petition with the Arizona Corporation Commission praying such Commission to take steps to prevent the further carrying on of business of the defendant and such other steps as would be beneficial to the petitioners, and that the purpose of filing such petition was to secure the aid of the Commission in causing the dissolution of the company and to prevent further dissipation of the funds. A copy of the petition was attached to the petition in intervention. It was finally alleged that no dissolution proceedings had been instituted until begun in this action "when for the pur-

pose of carrying out a plan and scheme for further dissipating and expending the resources of the defendant . . . . the bill in equity herein was filed" . . . . The prayer was that the interveners be allowed to intervene and "be joined as defendants in this action and request that they may be permitted to join in the prayer of the petition to the extent that a receiver be appointed" * * * etc.

The petition addressed to the Corporation Commission, a copy of which was attached to the petition of intervener (R. 2477, p. 22) complained that payments had been made by the Bankers' Fire Insurance Company for attorney's fees, salaries and traveling expenses aggregating $1,731.69. That in June the company only had a surplus of $10,150, as against insurance of over one million dollars; that although the company is not doing any business it never had the policies re-written "and that should there be any material fire losses in the near future not only will the surplus which is being held by the said officers aforesaid (meaning the officers of the defendants) be eaten up, but the Merchants & Insurers' Reporting Company and eventually the stockholders, your petitioners, be forced to pay large amounts out of their pockets to cover said losses."

The petition contains many other allegations, none of which, however, in any way impugn the conduct of the complainant company or its officers.

Perhaps the most extraordinary feature of the petition is that it is addressed to the Arizona Corporation Commission, of which the Intervener Jones was and is a member and yet it is signed by this same person as a petitioner (R. 2477, p. 27). Thus it appears the petitioner was addressing the petition to himself. It is not surprising that the prayer of the petition was herd and granted.

In opposition to the amended petition in intervention the complainant filed the affidavit of every person Jones alleged he represented in his unverified petition in intervention, repudiating Jones and withdrawing any prior authority in Jones to represent them (R. 2477, p. 33, 34).

This was filed January 10, 1914 (R. 2477, p. 34) and apparently the cause remained at rest until March 17, 1914, when it was announced that the cause was set for argument on April 7, which was subsequently changed to April 8 (R. 2477, p. 35).

On April 8, 1914, counsel appeared before the court (R. 2477, p. 37).

The demurrer to the petition of intervention was argued and overruled and the interveners were allowed to intervene.

The court then authorized the interveners to file affidavits "in support of their application for a receiver"

and the plaintiff and defendant were afforded the privilege of replying.

In other words, the intervener was told by the court to make a record to support the appointment of a receiver (R. 2477, p. 37), the future appointment of which had already been announced by the court. The demurrer which was interposed on April 8, 1914, and overruled, appears at p. 30, 40 R. 2477.

On April 13, Jones filed a new petition in intervention substantially similar to the previous petitions, in which, however, he assumed to represent sixteen California stockholders whose stock holdings were alleged to aggregate 200 shares instead of those whom he previously assumed to represent. This petition was supported by the affidavit of P. A. Parker, filed April 13, 1914, which contained much wholly irrelevant matter (R. 2477, p. 53-59) and to which she attached the contract of reinsurance which the defendant companies made on October 21, 1913, with the Fireman's Fund Insurance Company (R. 2477, p. 60-63) and the order of the Corporation Commission dated October 24, 1913 (R. 2477, p. 64-65), to which the Commission sought to give a retroactive effect by referring to the status of the companies' property as of October 21.

This showing was opposed by both complainant and defendant by the joint affidavit of John Castera, G. W. Boynton, H. F. Stanley, W. A. Johnston and Marshall Stimson (R. 2477, p. 66).

These gentlemen, who constituted the board of directors of the complainant company (R. 2477, p. 67), deposed that the complainant company owned all of the stock of the Bankers' Fire Insurance Company except three shares held by the directors thereof, that they unanimously passed a motion directing the directors of the Bankers' Fire Insurance Company to settle all the liabilities of that company and to turn over its assets and to dissolve the company; that these instructions were communicated to the directors of the defendant company, who, pursuant thereto, paid and cancelled all of the debts and liabilities of the company; that a stockholders' meeting of the defendant company was held thereafter and every share of stock of said defendant company was duly represented and it was unanimously resolved to dissolve the defendant company. The affidavit further averred that the affiants as directors of the complainant company were ready to receive in kind the assets of the defendant company; that the defendant company had then no debts or liabilities and that the assets thereof consisted of notes, mortgages and bonds largely covering property in California. Further, that complainant desires these properties turned over to it in kind without the delay and expense incident to reducing the same to cash. That no expense has been incurred by the defendant company beyond the necessary legal expenses since October 1, 1913, and that dissolution is desired without the delay and expense of a receiver being appointed therefor.

The joint answer of complainant and defendant was also filed to this new petition of Jones (R. 2477, p. 69). The answer demurred to the petition of Jones particularly because it failed to show that Jones or any of those he assumed to represent had any interest in the subject of the litigation and failed to disclose any right to intervene, and because it affirmatively appeared from the petition itself that neither Jones nor any of his associates were proper or necessary parties, but that they were unnecessary and improper parties and also pointed out the failure to comply with Rule 27 of the Equity Rules. It put in issue the allegations of fact in the petition and charged Jones with bad faith in that he intervened solely for the purpose of securing the appointment of a receiver at great expense to the plaintiff and defendant and for no useful or lawful purpose whatsoever. This joint answer was verified at length both by the president of the complainant and the president of the defendant (R. 2477, p. 74).

On April 25, the demurrer was overruled (R. 2477, p. 73) and nothing further was done until on July 1, 1914, the court appointed a receiver (R. 2477, p. 76).

The order recites the coming on of the "cause" to be heard upon the petition of Jones and others in intervention and upon the demurrer "and upon the motion of defendant to dismiss said petition for intervention and the answer thereto and after hearing evidence, both oral and documentary, in support of the said petition for in-

tervention and against the same, and fully considering the same, it was by the court ordered that the said petition for intervention should be allowed and the prayer thereof should be granted." This recitation is merely that evidence apart from that disclosed in the record was taken in support of the application to intervene. It appears of record, however, that only the affidavits, petitions and answers were used in support of and in opposition to the motion for a receiver. The order continues and recites that it is necessary to appoint a receiver and appoints Mr. Cassidy as such upon his giving a bond of $3,000, "with full power and authority to do any and all the acts necessary in the premises for the full and complete performance of this order and subject to the further orders and rules of this court in the premises." We have never seen an order appointing a receiver confer such sweeping, and at the same time, such vague powers upon the receiver. What he is to do is not apparent. What is necessary "in the premises for the full and complete performance of this order?" It is to review and to reverse this order that this appeal is taken.

The assignments relied upon are the following:

III. "The Court erred in appointing a receiver of the Bankers' Fire Insurance Company, the defendant herein, by order entered July 1st, 1914, upon the application of

F. A. Jones for himself and in alleged behalf of all others similarly situated stockholders of said Merchants & Insurers' Reporting Company, the complainant herein, in each and all of the following particulars:

First: Because the complainant's bill in equity herein was duly filed and served on the 25th day of October, 1913, praying for a dissolution of the defendant and the appointment of its existing directors as its trustees for the purpose of dissolving and winding up the defendant, and that on the same day defendant's answer was duly filed and served herein admitting the truth of each and every allegation contained in the complaint herein and joining in the prayer of the complaint for a dissolution of the defendant, and that thereafter, on November 12, 1913, and prior to the filing of the petition of said F. A. Jones for leave to intervene, a hearing was had herein before the Hon. Wm. H. Sawtelle, Judge of the United States District Court, and that at said hearing after the allegations of the complaint had been proved by competent evidence the defendant by its counsel joined in the prayer for dissolution and the directors of the defendant company offered to the court to serve as trustees of the properties of the defendant for the purpose of the dissolution of the defendant and the winding up of its affairs in accordance with the directions of the court and upon such bond as the court might require without compensation, and that therefore there was no right or cause for the appointment of a receiver of the defendant.

Second: Because the petition in intervention herein and the affidavit of P. A. Parker filed in support thereof, upon which the application for the appointment of a receiver of the defendant herein was made, contain no allegation that the defendant is insolvent or tending to show that defendant is insolvent, or that the officers or directors or those in control of the defendant company have been or are guilty of fraud or breach of duty in managing and controlling the defendant's afafirs.

Third: Because it is set forth in the bill or in the affidavit of John Austera, F. W. Boynton, H. Y. Stanley, W. A. Johnston, and Marshall Stimson, directors of the complainant filed herein in opposition to the application for a receiver of the defendant on April 20, 1914, and proved upon the hearing herein and not denied that the defendant is without debts or liabilities, that the complainant is the owner of all the capital stock of the defendant, and that the Board of Directors of the complainant are desirous of dissolving the defendant without the delay and expense of a receivership.

Fourth: Because neither the intervenor nor the other persons mentioned in the petition in intervention herein who alone seek a receivership for the defendant herein have any interest in the subject matter of this litigation."

We will discuss the errors assigned as follows:

POINT I.

The order is eroneous and constitutes an abuse of judicial discretion.

The record discloses no grounds whatever for the appointment of a receiver.

The defendant company was not insolvent.

Its assets and properties were not in jeopardy and no necessity for conservation or preservation—pendente lite was shown and no such necessity existed.

Indeed the cause was not pendente lite.

It had been tried and the parties were awaiting the announcement of the basis on which a final decree could be entered which should have directed the delivery of all the property of the defendant to the complainant as its equitable owner.

The application was made by a total stranger to the transaction after a trial and while the parties were awaiting a final decree.

It appeared that the defendant company was entirely solvent and that it had assets consisting of notes and mortgages, most of which affected California debtors and property.

It appeared that the company owed no debts.

It had re-insured in a well-known and thoroughly reliable company all of its outstanding insurance, which the appellee himself described in substance as precarious

and as an imminent danger to the complainant company and its stockholders.

Every share of its stock except three directors' shares was owned by the complainant.

The complainant was therefore the equitable owner of the defendant's assets.

The defendant company desired to assign to the complainant all its assets but without any authority whatever to do so the Corporation Commission, of which this same Jones was a member on October 24, 1913, assumed to restrain all disposition of the company's property (R. 2477, p. 64).

The absolute illegality of this action on the part of the Commission appears from an inspection of the Insurance Code of Arizona. Civil Code of Arizona, 1913, par. 3377 et seg. The fact that Jones deliberately exercised his functions of a quasi judicial character while a member of that Commission with reference to these very companies in which he had a pecuniary interest appears from the facts alleged and admitted in the Supreme Court of the State in State ex rel Bullard vs. Jones, 137 Pac. 544.

The complainant desired to take over the assets which belonged to it in kind, but the court below intervened by its order appointing a receiver and prevented this simple, expeditious and economical method of transfering the assets of the defendant to the complainant.

Instead of the litigants being permitted to deal with

their own property in this way, as they had a clear and unquestionable right to do, a receiver was appointed with no useful function to perform. While the recitative part of the order is voluminous, the ordering part is nothing but the most general language, far too vague to authorize any specific act or impose any definite duty. All the receiver can do is to reduce the assets of the defendant to cash at great expense to the complainant, the equitable owner of the assets, and when he receives the cash, after deducting his own fees and those of his counsel, he must puy the surplus to the plaintiff. But his collection of the defendant's assets would entail expensive ancillary proceedings in the Southern District of California, and when at great expense he has extended the receivership to California and collected the assets they would be returned into the court of original jurisdiction only to have the remnant thereof delivered to the complainant, to be again taken to California, where the complainant resides. All of which could lawfully have been accomplished by the simple act of the parties—which act was delayed during the great length of time the court took in holding the matter under advisement, although no controverted issue of law or fact was to be determined, from the date of trial, Nov. 12, 1913, until July 1, 1914, when judiccial action finally culminated, not in the final decree to which the parties were entitled, but in an interlocutory order after trial appointing a useless receiver.

This we submit was a plain misadministration of justice. With great respect we submit it made a costly travesty of a serious judicial proceeding.

No possible benefit can result to the litigants from such a course. The receiver and his counsel are the only ones who can possibly benefit thereby. Even the intervenor Jones derives no benefit therefrom, but in reality sustains loss. But his interest as a stockholder of the complainant is so insignificant that it is utterly immaterial to him how much this receivership may cost the complainant.

He owns stock of the par value of $500, or one-seventh of one per cent of the outstanding capital of complainant (R. 2477, pp. 16, 41, 53). He has 50 shares of $10 each out of a total of 35,000 shares. If every dollar of the expenditure of which he complains had been entirely wasted the total loss was $1731.69. Of this, Jones lost, taking his own figures, $2.47. There is, of course, no way of knowing what loss will be entailed upon complainant through the expenses incident to this receivership. Based, however, upon assets in excess of $200,000 it may fairly be assumed that it will run up to thrice $1731.69. In this event Jones will lose as much as six or seven dollars more. We do not calculate the grand totals for the other intervenors alleged to be represented by Jones, as no opportunity was ever afforded to appellants to test the truth of his claim to represent them. But if all of them are really repre-

sented their share of the losses complained of does not exceed about $10.00.

And at whose instance was this receiver appointed? Nominally at the instance of the intervenor Jones; actually the appointment was sua sponte.

We say this because we respectfully contend that the intervenor Jones was not a party to the proceedings, notwithstanding the court's order allowing him to intervene. He was nevertheless a total stranger to the matters before the court and it was a plain abuse of discretion to permit him to interfere in the litigation and on his nominal motion to appoint a receiver under the circumstances disclosed.

Jones aserted no equity which entitled him to intervene. He possessed none. He made no charge of any character against the officers of the complainant company, in which he was an insignificantly small stockholder. His whole attack was against the officers of the defendant company. His prejudices in this respect are reasonably inferable from the case of State ex rel Bullard vs. Jones, 137 Pac. 544. He did not pretend that he had ever made any demand upon the directors of the complainant to do anything he wanted done. Indeed his various petitions in intervention and his petitions addressed to himself as a member of the Corporation Commission are replete with absurd inconsistencies constituting the pretended grievances of these insurgent and mischievous stockholders. His sole claim to the right

to intervene is that he is a stockholder not in the defendant companies but in the complainant.

What more can he receive after he intervenes than he will receive as a stockholder of the complainant without intervention? His prayer was that he and his 16 California associates be joined as parties defendant.

That the granting of his prayer would destroy the diversity of citizenship requisite to support the court's jurisdiction was apparently of no consequence.

It might just as well be announced that whenever a corporation brings suit any stockholder therein may intrude himself into the litigation merely by moving to intervene therein.

Such is the effect of the learned court's ruling permitting intervention. With great respect for the learned court below, we submit that the granting of permission to Jones to intervene in the cause upon the showing made was a plain and clear abuse of judicial discretion. So plain do we regard it that we think it clear that it constituted no support for the motion for the receiver and while as we have said the motion was nominally by the intervenor, we think the appointment can only be justified provided it is such an extreme case as to support the appointment by the court sua sponte.

Is it such a case?

We have sought in vain for any possible justification of the order complained of. We have found none.

We do not think this court can countenance and place the stamp of its approval upon the appointment of a receiver in this case. The necessity for a costly receivership, if it exists, to bring about a simple transfer of assets from one party to another is a reflection upon the efficiency of our jurisprudence.

It is not disputed that the plaintiff owns every share of stock but three in the defendant company. It is admitted by the record that the defendant company is solvent; that it has no debts and that all its insurance obligations are re-insured.

Both complainant and defendant desire the defendant to deliver its assets in kind to the complainant, its equitable owner.

Both earnestly protest against the imposition of an enforced guardianship over them and their property by the appointment of a receiver who has nothing whatever to do except to effect a transfer of assets from the defendant to the complainant and to charge the complainant with the receiver's fees and those of his counsel.

And this is sustained upon the motion of a small stockholder of the complainant company having no possible relation to the case.

In reality a total stranger to the record, although authorized by the court to intervene therein—one who makes no claim of any kind against the complainant, one whose charges against the directors of the defendant, if true, show that the complainant and not the in-

tervenor is the proper party to redress the wrongs alleged.

No grounds existed for the appointment of a receiver. The order appointing a receiver is a plain abuse of judicial discretion.

We would not have this court suppose that we entertained anything but the highest regard for the learned court below or for the particular receiver who was appointed in these cases. But we submit that when litigants are required to pay tribute to the court's officers for the privilege of lawfully transferring from the defendant, property which indisputably belongs to the plaintiff, our protest is justified. As officers of the court below and as counsel for the parties injuriously affected, it is not only our duty but our privilege to protest against the order appealed from.

We do protest against it and ask that the order be reversed with costs.

Respectfully submitted,

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San Francisco, October 16, 1914.